INTRODUCTION

THE DILEMMA OF INTERPRETING RULES OF CIVIL PROCEDURE: A PROPOSAL FOR ELASTIC FORMALISM

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The Texas Rules of Civil Procedure are constructed in such a way as to grant guaranteed rights of procedure to all litigants, in the same sense that drivers on a highway are assured that other drivers (at least in the United States) will drive on the right side of the road.[1] In trial, however, it is the duty of a party to call attention to any deviation from the rules, through timely, contemporaneous[2] preservation of error.[3] Judges, while they do police trials, are not forced (placed at risk of reversal) to act, until a mistake or deviation from the rules has occurred during a trial, and is called to their attention.[4] Once error is preserved through some form of objection,[5] the complaining party is entitled to a new trial, if that party loses, appeals, and the error is found to be erroneous and harmful.[6]

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[1] *See* TEX. R. CIV. P. 1 ("The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.").

[2] *In re* Toyota Motor Sales, U.S.A., Inc., 407 S.W. 3d 746, 770 (Tex. 2013).

[3] *See* Punch v. Gerlach, 263 S.W.3d 770, 771 (Tex. 1954) (The spirit of the rules is to charge the attorneys of the litigants with the responsibility of preserving the legal rights of their clients in the progress of litigation by timely action.").

[4] *See generally* TEX. R. APP. P. 33.1 (outlining the rules of preservation). For a look at other sources that discuss preservation, see generally TEX. R. EVID. 103, 104; *In re* L.M.I, 119 S.W.3d 707 (2003) ("In an action to terminate parental rights, adhering to the preservation of error rules isn't a mere technical nicety; the interests at stake are too important to relax rules that serve a critical purpose. Appellate review of potentially reversible error, never presented to a trial court, would undermine the Legislature's dual intent to ensure finality in these cases and expedite their resolution."); Bushell v. Dean, 803 S.W. 2d 711 (Tex. 1991) (In order to preserve a complaint for appellate review, a party must present to the trial court a timely (contemporaneous) request, objection or motion, state the specific grounds therefore, and obtain a ruling.); John M. O'Quinn & L. Wayne Scott, *Exclusion of Evidence and Preservation of Error*, STATE BAR OF TEXAS GENERAL EVIDENCE: HOW TO PRESENT AND EXCLUDE EVIDENCE (1979); David F. Johnson, *Reservation of Error and Standards of Review Regarding the Admission or Exclusion of Expert Testimony in Texas*, 48 S. TEX. L. REV. 49 (2006); Sean M. Reagan, *Recurring Themes in Preserving Error in Civil Cases*, 22 APP. ADVOC. 392 (2010).

[5] The objection may be to evidence, argument, conduct, judicial action or inaction, special appearance, motion to change venue, objection to charge, receipt of charge, post-verdict actions, and any other procedural or substantive mistake made by the trial court.

[6] *See* Reliance Steel & Aluminum Co. v. Sevcik, 267 S.W.3d 867, 871 (Tex. 2008) (stating "[e]rroneous admission of evidence is harmless unless the error probably (though not necessarily) caused rendition of an improper judgment). The court continues, recognizing

> "the impossibility of prescribing a specific test" for harmless-error review, as the standard "is more a matter of judgment than precise measurement." A reviewing court must evaluate the whole case from voir dire to closing argument, considering the "state of the evidence, the strength and weakness of the case, and the verdict"

Id.; Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989) ("[The Texas Supreme Court] will ordinarily not find reversible error for erroneous rulings on admissibility of evidence where the evidence in question is cumulative and not controlling on a material issue dispositive of the case"); 6 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEX. CIV. PRAC. APP. PRAC. § 3:14 (2d ed.) (discussing the effect of error in

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It is clear that the rules and the interpretation of the rules, as they have accumulated over time, have created a user friendly system that allows the correction of mistakes with relative ease, depending upon when the mistake is caught and the correction is sought. The earlier in the process the problem is found, the easier it is to correct. If one can picture a container holding a controversy, with the container wide at the bottom, but which narrows to the smallest opening possible at the top, one would see the nature of the Texas procedural system and how that system is designed to deal with procedural problems in contested litigation. It is easy to correct mistakes before judgment (when in the broad base of the container), harder on appeal in the intermediate court of appeal (as the container narrows), and difficult in the Texas Supreme Court (when the container is at its most narrow point).

III. THE TEXAS RULES OF CIVIL PROCEDURE ARE FRIENDLY WITH BUILT-IN ELASTICITY, WITHOUT REINTERPRETATION—TRIAL COURTS

Great flexibility is granted to trial courts in their attempts to apply rules. If a mistake is made,[7] and the error is promptly[8] and plainly[9] called to the court's attention, and a ruling from the trial court is obtained[10] or implied, it can be corrected by the trial judge until the judgment becomes final.[11] That is to say, the trial court has a period of plenary power[12] over the judgments, when corrections can be made after a judgment has been signed and entered. If not corrected, appeal is the general remedy for correction of the mistake, if error has been preserved.[13]

There exists a broad range of corrections a trial court can make post-judgment during the trial court's period of plenary power. For example, the court can grant a new trial, a judgment *non obstante veredicto*, a remittitur,

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selecting the wrong court, one without jurisdiction, and the general remedy that comes along with it—dismissal of the case).

[7] TEX. R. EVID. 103. (describing the procedure by which a party may claim and preserve an error in admitting or excluding evidence).

[8] *See* Bushell v. Dean, 803 S.W. 2d 711, 712 (Tex. 1991) (requiring a timely objection in order to preserve error for appellate review).

[9] *See* Campbell v. State, 85 S.W.3d 176, 185 (Tex. 2002) (finding an objection insufficient when it did not specify the statute which authorized the objection and when it did not specify the "things" prohibited under the unnamed statute); *McDaniel v. Yarbrough,* 898 S.W.2d 251, 252 (Tex. 1995) (requiring an objection to "state the specific grounds for the desired ruling if those grounds are not apparent from the context of the objection" because it will "[allow] the trial judge to make an informed ruling and the other party to remedy the defect"); Bridges v. Richardson, 354 S.W.2d 366, 368 (Tex. 1962) (recognizing an exception to the rule that a general objection does not preserve error: "a general objection that it is immaterial and irrelevant is sufficient to preserve right to review of error contained in admitting it").

[10] *See In re* ZLT, 124 S.W.3d 163, 165 (Tex. 2003) (emphasizing the necessity of a trial court expressly or implicitly ruling on a request, objection, or motion in order to preserve error for appellate review).

[11] *See Orion Enters., Inc. v. Pope,* 927 S.W.2d 654, 658 (Tex. App.—San Antonio 1996, orig. proceeding) (describing the trial court's power to reconsider its judgment and interlocutory orders "until thirty days after the date a final judgment is signed or, if a motion for new trial or its equivalent is filed, until thirty days after the motion is overruled by signed, written order or operation of law, whichever first occurs").

[12] *Orion Enters., Inc. v. Pope,* 927 S.W.2d 654, 659 (Tex. App.—San Antonio 1996, orig. proceeding): ("Plenary power" is "that which is '[f]ull, entire, complete, absolute, perfect, unqualified.'") (quoting *Mesa Agro v. R.C. Dove & Sons,* 584 S.W.2d 506, 508 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.); *see also*, Deen v. Kirk, 508 S.W.2d 70, 72 (Tex. 1974) (recognizing, thirty days after the rendition of a judgment, a court will lack "jurisdictional power to hear and adjudicate").

[13] TEX. R. APP. P. 33.1 (listing the requirements to show error has been preserved so that a complaint can be presented on appeal); *In re* L.M.I, 119 S.W.3d 707, 711 (Tex. 2003) (explaining the need for objecting with timeliness and specificity and obtaining a ruling because of the dangers of allowing an appeal based on unpreserved error).

or other similar relief.[14] Until recently, that power was broader. Trial courts could grant new trials "in the interest of justice."[15] Now, they may do so only, when there is an announced and detailed reason for such a new trial.[16] In other words, a statement by a trial court that grants a new trial "in the interest of justice" is an insufficient explanation for setting aside a jury verdict.[17] There must be an "articulable reason" given for the new trial.[18]

> A trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict), and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand . . . .[19]

However, once jurisdiction is properly passed to the appellate courts, only those errors that have been properly preserved or are fundamental may then be considered.[20] To pass jurisdiction[21] once a final[22] judgment is entered, a notice of appeal must be filed within thirty or ninety days following the signing of the judgment.[23]

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[14] *See* 5 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 28:44 (2d. ed. 2015) (describing a remittitur as "frequently appropriate when the complaint is that the verdict is so excessive as to shock the conscience of the court," a remedy on which the refusal of a new trial may be conditioned, and results in a remittance "in an amount, set by the judge, that reduces the reward to a proper sum that comports with the evidence"); *id.* § 27:77 ("[U]pon motion and reasonable notice the court may render judgment *non obstante veredicto* if a directed verdict would have been proper, and . . . the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence").

[15] *See In re* United Scaffolding, Inc., 377 S.W.3d 685, 689 (Tex. 2012) (holding "an order based solely on 'the interest of justice' is insufficient" as is one that "could just as well be construed as relying solely on 'the interest of justice and fairness'").

[16] *See In re* United Scaffolding, Inc., 377 S.W.3d 685, 688-689 (Tex. 2012) (concluding there is no abuse of discretion when a trial court's reasons for granting a new trial are "specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand").

[17] *See In re* Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 215 (Tex. 2009) (directing the trial court to state reasons why it refused to enter judgment, because "[b]road statements such as 'in the interest of justice' are not sufficiently specific"). *See generally* Robert W. Calvert, *In the Interest of Justice,* 4 ST. MARY'S L.J. 291 (1972).

[18] *See In re* United Scaffolding, Inc., 377 S.W.3d 685, 686 (Tex. 2012) ("[A] trial court's order granting a motion for a new trial must provide a reasonably specific explanation of the court's reasons for setting aside a jury verdict.").

[19] *Id.* at 688-89.

[20] *See* Bay Area Healthcare, Grp., Ltd. v. McShane, 239 S.W.3d 231 (Tex. 2007) ("Even if a trial court errs by improperly admitting evidence, reversal is warranted only if the error probably caused the rendition of an improper judgment" and the reviewing court will "review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted."); Bradley v. State *ex rel.* White, 990 S.W.2d 245, 247 (Tex. 1999) ("When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence and determine all questions presented."); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993) (holding standing is an indispensable tool of a court in deciding a case and "is implicit in the concept of subject matter jurisdiction" even though standing was not raised by a party and that is normally fundamental error); Mapco Inc. v. Carter, 817 S.W.2d 686, 687 (Tex. 1991) ("[L]ack of jurisdiction is fundamental error and may be raised for the first time before [the Supreme Court of Texas]"); Pirtle v Gregory, 629 S.W.2d 919, 920 (Tex. 1982) ("Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas."); McCauley v. Consol. Underwriters, 304 S.W.2d 265, 266 (Tex. 1957) ("When

A. *Mistakes in the Trial Court*

1. Jurisdictional—Plenary Power, Service, Invoking and Terminating Trial Court Jurisdiction

In the trial courts, jurisdiction[24] is conferred by filing a pleading and effecting service upon the defendant.[25] Once jurisdiction is obtained, a trial court retains that jurisdiction until a final judgment is entered and, thereafter, for either thirty days after the judgment is signed or thirty days after the last post judgment remedy is determined[26]—and longer if a party does not receive notice of the entry of a judgment.[27] Once those time periods pass, jurisdiction over a case in the trial court ends, and a notice of appeal[28] is required to continue a direct ordinary appeal.[29] A short extension for the filing of the notice of appeal is possible under Texas Rules of Civil Procedure 5, with the noted limitation that a trial court "may not enlarge the period for taking any action under the rules relating to new trial except as stated in these rules."

"Judicial action taken after the trial court's plenary power has expired is void and a nullity."[30] Filing a jurisdictionally necessary document outside a mandated timetable that is one or more day(s) late is fatal to continued jurisdiction.[31]

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the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter, the error will also be regarded as fundamental.").

[21] "After determining that the order may be taken up on appeal, the second and equally important issue is the timing of taking the steps to bring the order before the court of appeals." Tom Cowart, *The Appellate Clock*, 29 THE ADVOC. 110, 112 (Winter 2004). Cowart notes: "This issue is critical because the court of appeals cannot exercise jurisdiction over an order if its jurisdiction is not properly invoked. Thus, blowing a deadline in perfecting an appeal is the kiss of death for the attempt to obtain relief from an adverse order." *Id.*

[22] Separate rules exist for limited interlocutory appeals, and possible mandamus actions.

[23] TEX. R. CIV. P. 26.

[24] Jurisdiction relates to the power to hear and decide lawsuits. Morrow v. Corbin, 62 S.W.2d 641, 644 (Tex. 1933).

[25] State v. G.C. Olsen, 360 S.W.2d 398, 400 (Tex. 1960) (requiring jurisdiction to be "legally invoked; and when not legally invoked, the power to act is as absent as [if] it did not exist"), *overruled on other grounds*, Jackson v. State, 548 S.W.2d 685 (Tex. Crim. App. 1977); Waldron v. Waldron, 614 S.W.2d 648, 650 (Tex. Civ. App.—Amarillo, 1981, no writ) (demanding, in order to invoke the jurisdiction of a court, "that persons or property over which the court has potential jurisdiction be brought before the court by service of process").

[26] *See* TEX. R. CIV. P. 329b (promulgating the thirty-day time frame within which a motion for new trial must be filed).

[27] 5 ROY MCDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE § 28:2 (2d ed.).

[28] *See* TEX. R. APP. P. 26 (noting a trial court's jurisdiction is terminated upon expiration of its plenary power).

[29] *See* Elaine A. Carlson & Karlene S. Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 S. TEX. L. REV. 953, 1016 (2000) ("One party's filing invokes the appellate court's jurisdiction over all parties, but absent good cause, the court may not grant more favorable relief than the trial court in favor of a party who did not file a notice of appeal.").

[30] Moore Landry LLP. v. Hirsch & Westheimer, PC, 126 S.W.3d 536, 543 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (first citing *In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998); then citing *In re* T.G., 68 S.W.3d 171, 177 (Tex. App.—Houston [1st Dist.] 2002)); *see also* Jackson v. Van Winkle, 660 S.W.2d 807, 808 (Tex. 1983) ("The trial court loses plenary jurisdiction [thirty] days after judgment in the absence of a timely filed motion for new trial, so any action taken after the expiration of [thirty] days from judgment would be a nullity.").

[31] *See* TEX. R. APP. P. 2, 25.1(b), 26.3 (promulgating the rules for perfecting and timely filing an appeal); *see also* Harris Cty. Toll Rd. Auth. v. Sw. Bell Tel., LP, 263 S.W.3d 48, 56 (Tex. App.—Houston [1st Dist.] 2006) ("The time for filing a notice of appeal is jurisdictional in nature, and absent a timely filed notice of appeal or extension request, we must dismiss an appeal for lack of jurisdiction), *aff'd*, 282 S.W.3d 59 (Tex. 2009); *In re*

Jurisdiction is a matter of power, but even here, there is a built-in flexibility in the trial courts of Texas. The elasticity of the Texas Rules of Civil Procedure, as construed by the courts, is illustrated through the ease by which default judgments are set aside, clerical mistakes are corrected, and a cushion is built in for missed deadlines and delayed mail.[32]

a. Example—setting aside default judgments

The clearest example of the friendly nature (the elasticity) of the Texas Procedural Rules is evident in the handling of default judgments. If a party fails to answer a citation, and a default judgment is taken, it is possible to set that judgment aside with ease, *if done in time*.[33] If the party does not act within time for a new trial in the trial court, within six months, it may seek a reversal by restricted appeal.[34] Failing that, one more difficult procedure remains: the bill of review.[35] That formalized procedure is allowed for four years.[36]

Dickason, 987 S.W.2d 570, 570 (Tex. 1998) (stating when a trial court's plenary power expires, any judgment from the trial court is void); Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997) (discussing timing requirements for filing notice of appeal); Levit v. Adams, 850 S.W.2d 469, 470 (Tex. 1993) (stating ninety-first-day notice under Rule 306a is one-day too late).

[32] *See* TEX. R. CIV. P. 5 ("[P]roperly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time.").

[33] *See* Craddock v. Sunshine Bus Lines Inc., 133 S.W.2d 124, 126 (Tex. Comm'n App. 1939) (analyzing the conditions upon which a default judgment may be properly set aside).

[34] TEX. R. APP. P. 30.

[35] *See* Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998) (defining a bill of review and listing the three factors that allow a judgment to be set aside by a bill of review); State v. 1985 Chevrolet Pickup Truck, VIN: 1GCEK14HLFS165672, 778 S.W.2d 463, 464 (Tex. 1989) (per curiam) ("[T]his court has enunciated in specific detail the steps necessary to be followed in a bill of review proceeding."); Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 408 (Tex. 1987) (discussing the narrow grounds upon which a bill of review can set a judgment aside); Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex. 1979) (stating "Texas courts have enunciated several requirements that must be satisfied" in filing a bill of review); Schwartz v. Jefferson, 520 S.W.2d 881, 889 (Tex. 1975) (explaining a bill of review is an original proceeding, separate and distinct from the underlying judgment).

[36] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West 2011) (noting the four-year, residual statute of limitations); Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex. 1998) (providing the residual statute of limitations applies to bill of review actions).

b. Correction of clerical errors[37]

Again, elasticity is shown by the ease with which clerical errors,[38] as opposed to judicial errors,[39] in a judgment may be corrected at any time.[40] Then, if it becomes obvious on appeal that a party has made a clerical error—such as entering the wrong cause number—in an, otherwise, properly identified appeal document, correction will be allowed.[41] The rules relating to nunc pro tunc correction of judgments, in reality, extend the trial

[37] The failure to pay a filing fee is similar to a clerical error but is not separately discussed. The Supreme Court Supreme Court has dealt with this problem in a proper fashion. *See* Tate v. E.I. Dupont de Nemours & Co., 934 S.W.2d 83 (Tex. 1996). The filing of a post-judgment motion without paying the filing fee results in the extension of the trial court's plenary power, thus, also extending the appellate timetable if the filing fee is paid within the period of plenary power. The failure to pay the filing fee before the motion for new trial is overruled by operation of law may forfeit altogether the movant's opportunity to have the trial court consider the motion. However, the court failed to express an opinion on whether the failure to pay retroactively invalidated the conditional filing for purposes of the appellate timetable. That was laid to rest, and properly so, in *Garza v. Garcia*. Garza v. Garcia 137 S.W.3d 36 (Tex. 2004). There, Garcia timely filed a motion for new trial but never paid the fee. *Held*: A motion for new trial extends appellate timetables, even if the requisite filing fee is never paid. The court construes the Rules of Appellate Procedure liberally, so that decisions turn on substance, rather than procedural technicality. Nothing in those rules requires a fee to accompany a motion for new trial, or that such a fee be paid at all. Moreover, once a motion for new trial is conditionally filed, and timetables extended, all litigants benefit from knowing what timetables apply, even if they do not know whether the requisite fee was paid. The alternative would breed uncertainty, as the deadlines might automatically jump forward when the fee is quietly paid, or revert backwards if it is not. This is not to say filing fees are irrelevant. Absent emergency or other rare circumstances, a motion for new trial should not be considered, until the filing fee is paid. Here, Garcia's factual sufficiency complaint had to be presented to the trial judge, but because she never paid the $15 fee, the trial court was not required to review it. Thus, because no new trial fee was ever paid, the court of appeals correctly never addressed Garcia's factual sufficiency complaint, but correctly considered her venue complaint.

[38] *See* Andrews v. Koch, 702 S.W.2d 584, 585 (Tex. 1986) (emphasizing a nunc pro tunc judgment may only be entered to correct a clerical error not a judicial error).

[39] *See* Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986) (reiterating, once a trial court's plenary power has expired, it may only modify a judgment to correct a clerical error); Wallace v. Rogers, 517 S.W.2d 301, 303 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (evaluating the differences between clerical and judicial errors).

[40] *See* Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970) (outlining the timing during which clerical errors may be corrected).

[41] The Supreme Court has had no problem, in the last thirty-plus years, in correcting obvious attorney/party mistakes that do not reflect a lack of intent to act. Thus, in *City of San Antonio v. Rodriguez*, the appealing party placed the wrong cause number on the notice of appeal; all other information was correct. City of San Antonio v. Rodriguez, 828 S.W.2d 417 (pin) (Tex. 1992). While the court of appeals dismissed the appeal for want of jurisdiction, the Texas Supreme Court reinstated the appeal, saying:

> We have held that a court of appeals has jurisdiction over an appeal when the appellant files an instrument that is "a bona fide attempt to invoke appellate court jurisdiction." More recently, we reaffirmed the policy that "the decisions of the courts of appeals [should] turn on substance rather than procedural technicality." Here, there can be no doubt that the city's attempt to perfect an appeal was "bona fide" because, but for the erroneous cause number, the city's notice of appeal complied with the provisions of TEX. R. APP. P. 40(a) (2). We hold that the city's notation of the incorrect cause number on its notice of appeal does not defeat the jurisdiction of the court of appeals.

City of San Antonio v. Rodriguez, 828 S.W.2d 417, 418 (Tex. 1992) (alteration in original) (citations omitted) (first quoting Grand Prairie Indep. Sch. Dist. v. S. Parts Imports, Inc., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam); and then quoting Crown Life Ins. v. Estate of Gonzales, 820 S.W.2d 121 (Tex. 1991) (per curiam)). This was akin to the correction of a clerical (as opposed to a judicial) error in a final judgment, which may be made even after plenary power has otherwise expired.

court's plenary power for an indefinite period, but only to correct the clerical errors.[42] Any nunc pro tunc corrections are subject to appellate review.[43] This nunc pro tunc power, however, does not reawaken the entire case for review—only the clerical mistake is subject to correction.[44]

JURISDICTIONAL POWER—INVOKING AND TERMINATING APPELLATE JURISDICTION

Once a timely notice of appeal is filed, jurisdiction passes to the appellate courts. Normally, appellate courts may only alter a trial court judgment, or remand, when harmful error is found to exist on appeal,[45] although in extremely rare circumstances, the Texas Rules of Appellate Procedure allow the reversal of errorless judgments where it is "in the interest of Justice."[46]

"When reversing the court of appeals' judgment, the Supreme Court may, in the interest of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate."[47] One such exception exists, where remand is allowed in the interest of justice, because the law changes pending the appeal or, as a result of the appeal.[48]

When a plaintiff's judgment is reversed for legal insufficiency, the appellate court is required to render a take-nothing judgment.[49] However, even there, an exception has been created where both post-answer and no-answer default judgments have been reversed on appeal for legally insufficient evidence.[50]

The appellee will be required to perfect an appeal if the party seeks to alter the trial court's judgment.[51] In passing on the appeal, any procedural problems must be dealt with by the appellate courts before moving on to substance, if substantive matters are even reached. Normally, there is no difficulty with rule interpretation when a plain reading approach is used. However, if circumstances cause a perceived injustice, and the rules do not provide a means for correction, the courts must determine what to do. Several such situations and their solutions are dealt with here.

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42 *See* TEX. R. CIV. P. 329(b)(f) ("[T]he court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.").

43 *See* Escobar v. Escobar, 711 S.W.2d 230 (Tex. 1986) (conducting appellate review of nunc pro tunc order).

44 *See* TEX. R. CIV. P. 329(b) (h).

45 TEX. R. APP. P. 44.1; *see also Holt Atherton Indus., Inc. v. Heine,* 835 S.W.2d 80, 86 (Tex. 1992) ("As a general matter, when we sustain a no evidence point of error after a trial on the merits, we render judgment on that point."); *Mobil Oil Corp. v. Frederick,* 621 S.W.2d 595, 596 (Tex. 1981) ("[A]bsent circumstances of additional evidence to be developed or uncertainty of the decree, the appellate court has a duty to render the judgment which the trial court should have rendered."); TEX. R. APP. P. 43.3 (stating when an appellate court should render a trial court judgment); TEX. R. APP. P. 60.2 ("The Supreme Court may reverse the lower court's judgment in whole or in part and render the judgment that the lower court should have rendered.").

46 Robert W. Calvert, *In the Interest of Justice*, 3 ST. MARY'S L.J. 291 (1972).

47 TEX. R. APP. P. 60.3.

48 *See* Westgate, Ltd. v. State*,* 843 S.W.2d 448, 455 (Tex. 1992), *quoted in* Kerr-McGee Corp. v. Helton*,* 133 S.W.3d 245, 258 (Tex. 2004); Bulanek v. West Tex. 66 Pipeline Co., 209 S.W.3d 98 (Tex. 2006).

49 *See* Dolgencorp of Texas, Inc. v. Lerma, 288 S.W.3d 922, 929 (Tex. 2009) (providing the circumstances under which an appellate court is required to render a judgment).

50 *See* Dolgencorp of Texas, Inc. v. Lerma, 288 S.W.3d 922, 929 (Tex. 2009) (noting the split between court of appeals as to the proper disposition of a case when there is insufficient evidence to support a post-answer default judgment).

51 *See* TEX. R. APP. P. 43.3(b) (describing the circumstances under which a court of appeals must remand a case).

CHAPTER 1.
PRESERVATION OF ERROR AND THE HARMFUL ERROR RULE

1. *Introduction*

Before launching into a detailed presentation of the procedural intricacies of Texas Civil Procedure, one of its more fundamental aspects needs to be addressed. In the following pages of this book the student will be reading real decisions by real courts in Texas concerning Texas Civil Procedure. The majority of decisions in this book are from appellate courts in Texas. By in large the cases contained in this book discuss various alleged errors which occurred during the pretrial and trial process of the particular case. As a general rule a lawyer needs to bring the alleged error to the attention of the trial court for its consideration and decision in order for an appellate court to have the ability to consider the alleged error on appeal. The concept of preservation of error refers to those procedures which must be taken by a lawyer in a lower court to ensure that any alleged errors made by a lower court are available for review by an appellate court. *See* Rule 33 of the Texas Rules of Appellate Procedure.

Another fundamental aspect of Texas Civil Procedure that will be presented in this chapter concerns the manner in which an appellate court determines whether the error preserved and presented to it on appeal is of such a nature as to lead to a reversal of the case. As a general rule, even if error of law is determined to have occurred in the trial court level, appellate courts will not reverse the trial court unless the error which was committed "probably caused the rendition of a improper judgment or probably prevented the appellant from properly presenting the case" to the appellate court. This concept of reversible error has been given the popular name of the "harmful error rule". *See* Rules 44.1 and 61.1 of the Texas Rules of Appellate Procedure.

In the following pages the concepts of preservation of error and the "harmful error rule" will be briefly introduced. Throughout the remainder of the book the student needs to be very mindful of these basic concepts and of the various exceptions which can arise depending on the nature of the error or the type of proceeding which is presented to the court.

2. *Why Require That Error Be Preserved*

Most procedural rules are written to guide the parties and the courts in the conduct of litigation. When the rule is violated, an error occurs. The party aggrieved by that error has the alternative of insisting that the error be corrected, or of waiving the error. Parties regularly waive rules, and allow the rules to be ignored. When the party wishes to insist upon the observation of the rule, that party must preserve error at any time the other party or the court violate the rule. By complaining of the violation (preserving error),

a) the opposing party is given an opportunity to cure any error that may occur;
b) the trial court is given an opportunity to cure any error that may occur;
c) trial by ambush is prevented; and
d) appeal by ambush is prevented.

Following the trial of a case, a party seeking to alter a trial court's appealable order must perfect his appeal by filing a notice of appeal with the information required and in the manner dictated by Rule 25 of the Texas Rules of Appellate Procedure and within the time specified in Rule 26 of the Texas Rules of Appellate Procedure. Once the appeal has been perfected, and the record brought forward to the appellate court, the party seeking to alter the trial court's appealable order may through his brief request the court of appeals to review the alleged errors that had been properly preserved.

In addition, certain procedural errors committed by the trial court may be reviewed by an appellate court in an original mandamus proceeding pursuant to Rule 52 of the Texas Rules of Appellate Procedure. As will be shown in the following case, the basic requirements for an appellate court to exercise its original mandamus jurisdiction are an abuse of discretion by the trial court and no adequate remedy by appeal.

In re The PRUDENTIAL INSURANCE CO. OF AMERICA
148 S.W.3d 124
(Tex. 2004)

Gino John Rossini, John A. Mackintosh Jr., G. Luke Ashley and Camille Knight, Thompson & Knight, L.L.P., Dallas, for Relators.

Luke Madole, Russell F. Nelms, Dena Jean Denooyer, Carrington Coleman Sloman & Blumenthal, Dallas, for Respondents.

JUSTICE HECTH delivered the opinion of the Court, in which JUSTICE OWEN, JUSTICE SMITH, JUSTICE WAINWRIGHT, and JUSTICE BRISTER joined.

The parties to a commercial lease agreed to waive trial by jury in any future lawsuit involving the lease, but when the tenant and its guarantors later sued for rescission and damages, they nevertheless demanded a jury trial. The trial court denied the landlord's motion to quash the demand. In this original proceeding, the landlord petitions for mandamus relief directing the trial court to enforce the parties' contractual jury waiver. We conditionally grant relief.

I

Francesco Secchi, a native of Italy, and his wife Jane, a native of England, moved to Dallas in 1981, where they have lived ever since and have become naturalized citizens. The Secchis have been in the restaurant business since 1983, and they (or entities controlled by them) own and operate two Dallas restaurants, Ferrari's and Il Grano. In October 2000, a limited partnership the Secchis controlled, Italian Cowboy Partners, Ltd., leased space in a Dallas shopping center for another restaurant. The lease agreement was the product of six months' active negotiations with the landlord, The Prudential Insurance Co. of America, and its agent, Four Partners L.L.C. doing business as Prizm Partners (collectively, "Prudential"). The Secchis had negotiated at least two other leases over the years, and they and their lawyer successfully insisted on a number of changes in Prudential's proposals. Offers went back and forth, and the agreement went through seven drafts. Francesco, whose formal education extended only to about the eighth grade, did not read the lease but left that to Jane, whose educational background was similar but whose English was better. Jane went over the agreement with their attorney but focused on the economic terms. When the Secchis and Prudential finally reached an understanding, Francesco signed the lease as manager of the partnership's general partner, Secchi, L.L.C. Prudential insisted that the Secchis personally guarantee the lease, and that agreement was also negotiated and changed by the Secchis before they signed it.

The lease contains the following paragraph:

> Counterclaim and Jury Trial. In the event that the Landlord commences any summary proceeding or action for nonpayment of rent or other charges provided for in this Lease, Tenant shall not interpose any counterclaim of any nature or description in any such proceeding or action. Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions.

Prudential did not specifically point out this provision to the Secchis, and Jane testified that she never noticed it. She also testified that notwithstanding the clear meaning of the second sentence, she never intended to waive a jury trial in any future litigation. The guaranty agreement does not contain a similar waiver but does state that the Secchis agree to guarantee the tenant's "full and timely performance and observance of all the covenants, terms, conditions, provisions, and agreements" in the lease, and in the event of the tenant's default, to "faithfully perform and fulfill all of such terms, covenants, conditions, provisions, and agreements".

Some nine months after the lease was executed, the Secchis and their limited partnership (collectively, "ICP") sued Prudential in statutory county court, claiming in part that it was impossible to do business on the premises because of a persistent odor of sewage. Prudential counterclaimed for amounts allegedly due under the lease and guaranty. When the trial court notified the parties that a date for non-jury trial had been set, ICP filed a jury demand and paid the jury fee, as required by Rule 216 of the Texas Rules of Civil Procedure. The court then notified the parties that a date for jury trial had been set. Prudential moved to quash the jury demand, based on the waiver in the lease. ICP responded that contractual jury waivers in general, and the waiver in the lease in particular, are unenforceable. * * *

After a hearing, the court denied the motion in a brief order without explanation.

Prudential petitioned the court of appeals for mandamus relief, which that court denied with a short memorandum opinion, 2002 WL 1608233, explaining only that "the relators have not shown themselves entitled to the relief requested." Prudential then petitioned for relief from this Court, and we agreed to hear argument. * * *

* * *

Having concluded that the parties' contractual jury waiver is enforceable, we turn to whether Prudential is entitled to relief by mandamus. Prudential must meet two requirements. One is to show that the trial court clearly abused its discretion. We have concluded as a matter of law that Prudential was entitled to enforcement of the jury waiver. Since "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts", even when the law is unsettled, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion. Thus, Prudential has met the first requirement.

The other requirement Prudential must meet is to show that it has no adequate remedy by appeal. The operative word, "adequate", has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue. Thus, we wrote in *Walker v. Packer* that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." While this is certainly true, the word "merely" carries heavy freight. In *In re E.I. duPont de Nemours & Co*., we concluded that defending the claims of more than 8,000 plaintiffs in litigation that would last for years was not mere expense and delay, and that mandamus review of the denial of duPont's special appearance was justified, even though duPont could eventually appeal and did not appear to be in any danger of succumbing to the burden of the litigation. In *Travelers Indemnity Co. v. Mayfield*, we granted mandamus review of an order requiring a carrier to pay the plaintiff's attorney fees as incurred in a compensation case, even though the carrier could have appealed from the final judgment and won recovery for the amounts paid, because the order not only cost the carrier money but "radically skew[ed] the procedural dynamics of the case" by requiring the defendant to fund the plaintiff's prosecution of her claims. In *In re Masonite Corp*., the trial court on its own motion and without any authority whatever, split two cases into sixteen and transferred venue of fourteen of them to other counties. We held that the defendants were not required to wait until appeal to complain:

> Walker does not require us to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.

These cases, among a great many others that could be cited, serve to illustrate that whether an appellate remedy is "adequate" so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules.

Nor is the consideration whether to grant mandamus review confined to private concerns. No one suggested in *Masonite* that any individual party would suffer more by waiting to complain on appeal of the venue order than would any other party complaining of any other venue order in any other case. Two factors drove our decision in *Masonite*: the complete lack of authority for the trial court's order, and the impact on the legal system. We simply could not justify putting the civil justice system itself to the trouble of grinding through proceedings that were certain to be "little more than a fiction." The trial court's ruling in Travelers was novel but might easi-

ly have become a repeated error. Either way, the error was clear enough, and correction simple enough, that mandamus review was appropriate.

Prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals. The unavailability of mandamus relief increases the pressure for expanded interlocutory appeals. For example, when this Court refused to review venue decisions by mandamus, the Legislature responded by authorizing mandamus review of all decisions involving mandatory venue provisions. When we held that the denial of a special appearance would ordinarily not warrant mandamus review, the Legislature responded by creating an interlocutory appeal from the denial of a special appearance. When questions arose concerning the availability of mandamus to review the sufficiency of expert reports required in medical malpractice cases, the Legislature responded by creating an interlocutory appeal from the denial of dismissals of such cases for insufficient expert reports. Interlocutory appeals lie as of right and must be decided on the merits, increasing the burden on the appellate system. "Mandamus," on the other hand, "is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." As a selective procedure, mandamus can correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal. Appellate courts must be mindful, however, that the benefits of mandamus review are easily lost by overuse.

The issue before us in the present case—whether a pre-suit waiver of trial by jury is enforceable—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus. It eludes answer by appeal. In no real sense can the trial court's denial of Prudential's contractual right to have the Secchis waive a jury ever be rectified on appeal. If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If Prudential suffered judgment on an unfavorable verdict, Prudential could not obtain reversal for the incorrect denial of its contractual right "unless the court of appeals concludes that the error complained of . . . probably caused the rendition of an improper judgment". Even if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.

* * *

Only if a contractual waiver of trial by jury is enforced in the trial court can its propriety effectively be reviewed on appeal. The denial of trial by jury is harmless error only if there are no material fact issues to submit to a jury. But the denial of trial by jury is also reviewable by mandamus. A sentence in our opinion in *General Motors Corp. v. Gayle* suggests that this is not true, but we granted mandamus in that case to correct the trial court's denial of a jury trial, and we cited without disapproval three courts of appeals that we said "ha[d] reviewed jury trial orders by mandamus." To afford relief for the denial of a jury trial both by mandamus and by appeal, and to deny relief by either means for the refusal to enforce a jury waiver, unacceptably contorts review of the issue. Mandamus relief in a situation like this, in Professor Charles Alan Wright's words, "provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders."

* * *

The dissent suggests that mandamus relief should not be used to enforce contractual rights, but we used it for precisely that purpose only recently in *In re Allstate County Mutual Insurance Co*. to enforce the parties' agreement to submit to an appraisal process for determining the value of a vehicle claimed to be a total loss. The dissent states that we took "the United States Supreme Court's pronouncement that appellate delays defeated the 'core purpose' of contracts to arbitrate" as a "mandate . . . to provide an extraordinary remedy." Perhaps so, but the Supreme Court's "pronouncement" was also a statement of fact: lawsuits followed by appeals defeat the core purpose of arbitration agreements. For exactly the same reason, trial to a jury followed by appeal, if one were even allowed, defeats the reasons for agreeing to waive a jury in the first place.

The dissent argues that "authorizing mandamus relief to enforce a contractual jury waiver while relegating a party to its appellate remedy when denied its constitutional right to a jury trial" creates a procedural anomaly. If the premise were true, an anomaly would exist; but the premise is not true. We have never held that the denial of a jury trial, which can certainly be reviewed by appeal, cannot also be reviewed by mandamus. As we have already noted, we have faced the issue only once, in *General Motors Corp. v. Gayle*, and while one sentence of

that opinion states that mandamus is "generally not available" to review the denial of a jury trial, we nevertheless directed the trial court to abort or mistry the nonjury trial it had commenced and to set the case on its jury docket. We also cited three court of appeals cases that had "reviewed jury trials by mandamus." *General Motors* does not preclude review of the denial of a jury trial by mandamus.

Finally, the dissent argues that "[e]ven if parties may freely waive their right to trial by jury, there is no public policy reason for encouraging them to do so." Of course, enforcing an agreement is not the same as encouraging parties to make it. By enforcing contractual jury waivers, we no more encourage them than we encourage arbitration by enforcing arbitration agreements. Parties are free to agree to such remedies as they choose, and as we have noted, they may have good reasons for agreeing to waive a jury trial. What the dissent ignores is that there is a compelling public policy reason to enforce legal agreements freely made. The dissent does not find the jury trial waiver in this case illegal or contrary to public policy, yet it would deny all viable means of enforcement.

* * *

For these reasons, we direct respondent, the Honorable Sally Montgomery, to vacate her order of June 6, 2003, and the prior order of June 19, 2002, to grant Prudential's motion to quash the jury demand and payment of jury fee, and to return the case to the nonjury docket. We are confident she will promptly comply. Our writ will issue only if she does not.

CHIEF JUSTICE PHILLIPS, joined by JUSTICE O'NEILL, JUSTICE JEFFERSON, and JUSTICE SCHNEIDER, dissenting [omitted].

3. *Fundamental Error*

Fundamental or unassigned error is an exception to the general rule that error must be preserved during the lower court proceeding in order for an appellate court to consider any complaints about the specific error. The definition of fundamental error was fairly broad for a period of time. The current view of fundamental error, however was set in 1941, and is extremely restrictive.

Note

From time to time a significant primary holding from a case will be presented as a "Abbreviated Case". An "Abbreviated Case" is a short summary of a case that decides an important point that is printed in this book in outline form to reduce the length of the book. These notes are as important as "full" cases but add nothing significant other than the primary holding or holdings. The following short summary of the *McCauley* case is an example of an "Abbreviated Case".

MCCAULEY
v.
CONSOLIDATED UNDERWRITERS
157 Tex. 475, 304 S.W.2 265
(1957)

Facts: This is an appeal from the order of a district court setting aside a default judgment rendered at a previous term (after the trial court lost jurisdiction). The court of appeals affirmed.

Issues: Is this fundamental error? Yes. Fundamental error is an error which directly and adversely affects the interest of the public generally, as that interest is declared by the statutes or Constitution of Texas. A court's lack of jurisdiction is fundamental error.

Issues: Is there a difference between fundamental error in the Supreme Court and Court of Appeals? No. There used to be, but there is no longer any difference.

USAA TEXAS LLOYDS CO.
v.
MENCHACA
545 S.W.3d 479
(Tex. 2018)

Wallace B. Jefferson, Rachel A. Ekery, Alexander Dubose, Jefferson & Townsend LLP, Mary Margaret Roark, Thomas R. Phillips, Baker Botts LLP, Austin TX, Charles T. Frazier Jr., Alexander Dubose, Jefferson & Townsend LLP, Dallas TX, Bruce E. Ramage, Martin Disiere Jefferson & Wisdom LLP, Christopher W. Martin, Levon G. Hovnatanian, Paul Wayne Pickering, Robert T. Owen, Martin Disiere Jefferson & Wisdom LLP, Tanya Dugas, Raley & Bowick, LLP, Houston TX, for Petitioner USAA Texas Lloyds Company.

Jennifer Bruch Hogan, James C. Marrow, Richard P. Hogan Jr., Hogan & Hogan, Pennzoil Place, John Steven Mostyn, The Mostyn Law Firm, Houston TX, Gilberto Hinojosa, Law Offices of Gilberto, Hinojosa & Associates, P.C., Brownsville TX, Randal G. Cashiola, Cashiola & Bean, Beaumont TX, for Respondent Menchaca, Gail.

Michael A. Choyke, Thomas C. Wright, Lisa Wright, Wright, Close & Barger, LLP, Houston TX, for Amicus Curiae, Lexington Insurance Company.

Brendan K. McBride, The McBride Law Firm, Marc E. Gravely, Matthew R. Pearson, Gravely & Pearson, LLP, San Antonio TX, for Amicus Curiae, Brass Real Estate Funds, Texas Automobile Dealers Association, Texas Independent Automobile Dealers Association, Texas Organization of Rural & Community, Hospitals.

Russell S. Post, Beck Redden LLP, Houston TX, for Amicus Curiae, Cameron, a Schlumberger Company.

Dale Wainwright, Kendyl Taylor Hanks, Greenberg Traurig, LLP, Austin TX, Lindsay E. Hagans, Houston TX, for Amicus Curiae, Chamber of Commerce of the United States of America.

Catherine L. Hanna, Hanna & Plaut LLP, Austin TX 7870, for Amicus Curiae, Insurance Council of Texas.

Hugh Rice Kelly, Texans for Lawsuit Reform, Houston TX, for Amicus Curiae, Texans for Lawsuit Reform.

Marc S. Tabolsky, Penelope E. Nicholson, Schiffer Odom Hicks & Johnson PLLC, Houston TX, for Amicus Curiae, United Policyholders.

JUSTICE BOYD announced the Court's judgment and delivered the Court's opinion as to Parts I, II, and III.A, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE DEVINE, and JUSTICE BROWN joined, a plurality opinion as to Parts III.B and III.C, in which CHIEF JUSTICE HECHT, JUSTICE LEHRMANN, and JUSTICE DEVINE joined, and an opinion as to Parts III.D, III.E, III.F, and III.G, in which JUSTICE LEHRMANN and JUSTICE DEVINE joined.

After Hurricane Ike struck Galveston Island in September 2008, Gail Menchaca contacted her homeowner's insurance company, USAA Texas Lloyds, and reported that the storm had damaged her home. The adjuster USAA sent to investigate Menchaca's claim found only minimal damage. Based on the adjuster's findings, USAA determined that its policy covered some of the damage but declined to pay Menchaca any benefits because the total estimated repair costs did not exceed the policy's deductible. About five months later, at Menchaca's request, USAA sent another adjuster to re-inspect the property. This adjuster generally confirmed the first adjuster's findings, and USAA again refused to pay any policy benefits. Menchaca sued USAA for breach of the insurance policy and for unfair settlement practices in violation of the Texas Insurance Code.

* * *

* * * the jury in this case (1) failed to find in answer to Question 1 that USAA failed to comply with its obligations under the insurance policy; (2) found in answer to Question 2 that USAA violated the Insurance Code by failing to pay Menchaca's claim for policy benefits "without conducting a reasonable investigation with respect to" that claim; and (3) found in answer to Question 3 that USAA's statutory violation resulted in Menchaca incurring damages of $11,350, representing the amount of policy benefits USAA "should have paid" Menchaca.

* * *

* * * Here, the jury's answer to Question 3 (USAA "should have paid" $11,350 in policy benefits to Menchaca) necessarily addresses the same material fact as its answer to Question 1 (USAA "fail[ed] to comply with the terms of the insurance policy"), because both requested findings on whether USAA failed to pay benefits Menchaca was entitled to under the policy. The answers conflict because if USAA "should have paid"

Menchaca benefits under the policy and did not, then USAA necessarily failed to comply with the policy's terms.

* * *

When an irreconcilable conflict involves one jury answer that would require a judgment in favor of the plaintiff and another that would require a judgment in favor of the defendant, the conflict is fatal. *Little Rock Furniture Mfg. Co. v. Dunn*, 148 Tex. 197, 222 S.W.2d 985, 991 (1949). Here, both questions address the decisive issue—whether USAA failed to pay benefits Menchaca was entitled to under the policy. Without Questions 2 and 3, the jury's answer to Question 1 would require a judgment in USAA's favor. But without Question 1, the jury's answers to Questions 2 and 3 would require a judgment in Menchaca's favor. We thus conclude that the answers created a fatal conflict.

Our determination that the verdict contained a fatal conflict does not end the inquiry. Of course, a trial court should not enter judgment based on a verdict containing a fatal conflict until "the disputed question of fact . . . has been resolved." *Meyer*, 502 S.W.2d at 679. But we must decide whether we can consider a trial court's error in entering such a judgment when neither party has objected to the conflict.

Generally, as "a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion." TEX. R. APP. P. 33.1(a)(1)(A). This rule "conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds," promotes "fairness among litigants" by prohibiting them from surprising their opponents on appeal, and furthers "the goal of accuracy in judicial decision-making" by allowing the parties to "develop and refine their arguments" and allowing the trial court to "analyze the questions at issue." *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). Under, this rule, we will not consider an error that was not properly raised in the trial court "unless a recognized exception exists." *Id.*

An exception to the preservation-of-error requirement applies when the alleged error is "fundamental." "Except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006). Thus, "we have used the term 'fundamental error' to describe situations in which an appellate court may review error that was neither raised in the trial court nor assigned on appeal." *B.L.D.*, 113 S.W.3d at 350. Beginning in the 1800s, we held that a trial court's entry of a judgment based on inconsistent or insufficient jury answers constitutes fundamental error because the error is "an error of law apparent on the face of the record," *Van Valkenberg v. Ruby*, 68 Tex. 139, 3 S.W. 746, 748 (1887), courts are not "permitted to speculate" about a jury's intentions, *Moore v. Moore*, 67 Tex. 293, 3 S.W. 284, 285-86 (1887), and the law deprives courts of "the power to render judgment, which is given by law and not by consent of the parties," *Radford v. Auto. Underwriters of Am.*, 299 S.W. 852, 853 (Tex. Comm'n App. 1927) (internal citations omitted).

In the decades that followed these decisions, the courts of appeals applied the fundamental-error doctrine in numerous cases, concluding that a jury verdict containing a fatal conflict constitutes fundamental error requiring a new trial even if no party complained of or preserved the error. In 1949, we at least appeared to confirm these holdings in *Little Rock Furniture*, noting that the "law seems to be established that such a conflict cannot be waived by the parties and that a judgment on a verdict containing such a conflict must be set aside." 222 S.W.2d at 991 (citing *Radford* 299 S.W. 852; *Interstate Tr.*, 88 S.W.2d at 1110; *Kilgore*, 204 S.W.2d at 1005; *Marshall*, 151 S.W.2d at 919). But we had no opportunity to apply the exception in *Little Rock Furniture* because we concluded that the verdict in that case did not "disclose a fatal conflict." *Id.*

Shortly before we decided *Little Rock Furniture*, however, we began to reconsider the fundamental-error doctrine in light of recent statutory revisions and our adoption of the Texas Rules of Civil Procedure. *See Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 982-83 (1947). The fundamental-error doctrine "in civil actions arose in Texas under old statutes that stated that cases on appeal could be reviewed 'on an error in law either assigned or apparent on the face of the record.' " *Pirtle*, 629 S.W.2d at 920 (citing 2 Gammel's Laws of Texas 1562 (1898); 3 Gammel's Laws of Texas 393 (1898)). But after the Legislature repealed those statutes and we adopted the Rules of Civil Procedure in 1941, no law remained that authorized appellate courts to consider unpreserved or unassigned errors. *Id.* We concluded in *Ramsey*, however, that despite the lack of any express legal authorization, it remained "both the province and the duty" of appellate courts to consider errors that are "truly fundamental," such as "an error which directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of this state." *Ramsey*, 205 S.W.2d at 983. We later concluded

that fundamental error also exists when "the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter." *McCauley v. Consol. Underwriters*, 157 Tex. 475, 304 S.W.2d 265, 266 (1957). Citing *Ramsey* and *McCauley*, we have since repeatedly explained that the fundamental-error doctrine applies only in those two "rare instances," in which "the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas." *In re L.D.C.*, 400 S.W.3d 572, 574 (Tex. 2013) (quoting *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999)). Although we have not hesitated to apply the doctrine when the error is jurisdictional or adversely affects the public's (as opposed to the current parties') interests, we have repeatedly refused to apply the fundamental-error doctrine to other types of errors and have instead consistently restricted appellate review to properly preserved errors. For this reason, we have characterized the fundamental-error doctrine as "a rarity," *Am. Gen. Fire & Cas. Co. v. Weinberg*, 639 S.W.2d 688, 689 (Tex. 1982), and "a discredited doctrine," *B.L.D.*, 113 S.W.3d at 350 (quoting *Cox*, 638 S.W.2d at 868).

Soon after our decisions in *Little Rock Furniture* and *Ramsey*, we warned that cases "discussing fundamental error decided before the adoption of the Rules of Civil Procedure in 1941 must be considered in the light of changes in the concept of fundamental error made by the adoption of the new rules." *Lewis v. Tex. Emp'rs' Ins. Ass'n*, 151 Tex. 95, 246 S.W.2d 599, 600 (1952). The result of those changes, we later explained, is that the scope of "truly fundamental" error is "much narrower" than it was before the 1941 amendments. *McCauley*, 304 S.W.2d at 266; *see also Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 394 (Tex. 1993) (noting that we have since "taken a more restrictive view of fundamental error").

Before we clearly restricted the application of the fundamental-error doctrine to jurisdictional and public-interest errors in *McCauley*, courts of appeals continued to rely on *Little Rock Furniture* to hold that a fatal conflict in jury answers creates a fundamental error that appellate courts may review even if unassigned. But five years after *McCauley*, we rejected the statement in *Little Rock Furniture* and expressly held that, in light of the fundamental-error doctrine's restricted scope, the "entry of judgment by a trial court on conflicting findings does not constitute fundamental error." *St. Paul Fire & Marine Ins. Co. v. Murphree*, 163 Tex. 534, 357 S.W.2d 744, 749 (1962) (citing *Ramsey*, 205 S.W.2d at 979; *McCauley*, 304 S.W.2d at 265). We have since confirmed and reaffirmed that holding in several cases. With the exception of a few opinions that erroneously relied on *Little Rock Furniture* without citing or considering *Murphree*, the courts of appeals have repeatedly done the same.

We did not hold otherwise in our 1973 opinion in *Meyer*, 502 S.W.2d at 679. The trial court in *Meyer* entered judgment for the defendant based on the jury's verdict, but the court of appeals reversed and remanded the case "for further proceedings," concluding, "There being a fatal and irreconcilable conflict in the jury's answers, the verdict cannot stand, and the judgment based thereon must be set aside." *Meyer v. Union Mut. Life Ins. Co.*, 483 S.W.2d 7, 10 (Tex. Civ. App.—Dallas 1972), *aff'd*, 502 S.W.2d 676 (Tex. 1973). We agreed that the verdict contained a fatal conflict and affirmed, stating that such a verdict "cannot be regarded as an acceptable resolution of the disputed question of fact, and judgment should not be rendered until that fact issue has been resolved." *Meyer*, 502 S.W.2d at 679. Neither the court of appeals in *Meyer* nor this Court, however, addressed the question of whether error based on conflicting jury answers is fundamental or must be preserved, nor did they cite *Little Rock Furniture*, *Ramsey*, *McCauley*, *Murphree*, or any other authorities on that issue. In fact, neither the court of appeals nor this Court cited *any* authority for reversing the trial court's judgment in *Meyer*.

Until today, this Court has never cited, relied on, or discussed *Meyer* as authority on any issue. Only three courts of appeals have ever cited it, and none cited it as authority on the issue of whether error based on conflicting jury answers is fundamental or must be preserved. That is not to suggest that the Court wrongly decided *Meyer*; rather, it appears to simply confirm that the issue was not *at issue* in *Meyer*. Neither our opinion nor the court of appeals' opinion in *Meyer* ever mentioned or addressed whether any party objected to the conflicting answers or whether they should have. As best we can tell, the plaintiff in *Meyer* never complained that the defendant did not preserve the error, and the Court simply never addressed that issue. We cannot agree that *Meyer*—which never addressed the preservation requirement—somehow overruled or trumps *Murphree*, *Duke*, *Sunland Supply*, and the dozens of other opinions that directly addressed the issue. Consistent with these numerous applicable precedents, we conclude that the fatal conflict in the jury's verdict in this case does not constitute fundamental error, and as a result, we cannot consider that conflict unless the error was properly preserved. *Mack Trucks*, 206 S.W.3d at 577.

* * *

Having concluded that the trial court and court of appeals erred in disregarding the jury's answer to Question 1, we are left with findings that support the judgment in Menchaca's favor based on statutory violations but that also contain a fatal conflict. We could render judgment for Menchaca based on the jury's verdict because USAA failed to preserve that conflict. In the interest of justice, however, we could also "remand the case to the trial court even if a rendition of judgment is otherwise appropriate." TEX. R. APP. P. 60.3. Such a remand is particularly appropriate when it appears that one or more parties "proceeded under the wrong legal theory," *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993), especially when "the applicable law has . . . evolved between the time of trial and the disposition of the appeal." *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 162 (Tex. 2012); *see Hamrick v. Ward*, 446 S.W.3d 377, 385 (Tex. 2014) (remanding in the interest of justice "in light of our clarification of the law"); *Moriel*, 879 S.W.2d at 26 (same, in light of our "substantial clarification"). In light of the parties' obvious and understandable confusion over our relevant precedent and the effect of that confusion on their arguments in this case, as well as our clarification of the requirements to preserve error based on conflicting jury answers, we conclude that a remand is necessary here in the interest of justice.

* * *

For the reasons explained, we reverse the court of appeals' judgment and remand the case to the trial court for a new trial in the interest of justice.

CHIEF JUSTICE HECHT filed a concurring opinion (omitted).

JUSTICE BLACKLOCK concurs in the judgment without opinion.

JUSTICE GREEN filed a dissenting opinion in which JUSTICE GUZMAN and JUSTICE BROWN joined as to Parts I, II, and IV, and a plurality opinion as to Part III, in which CHIEF JUSTICE HECHT, JUSTICE GUZMAN, and JUSTICE BROWN joined (omitted).

JUSTICE JOHNSON did not participate in the decision.

PIRTLE
v.
GREGORY
629 S.W.2d 919
(Tex. 1982)

Sudderth, Woodley & Dudley, Keith Woodley, Comanche, for petitioner.
Thompson & Cook, John R. Cook, Breckenridge, for respondents.

PER CURIAM.

Stanley Pirtle brought suit for specific performance and for removal of cloud on 512 acres of land. Pirtle sued Layne Gregory, Grady Gregory, and Kathy Coker because they had contracted in writing but failed to execute an oil and gas lease to Pirtle, as lessee. Layne and Grady Gregory later executed an oil and gas lease on the property to James P. Flanagan. Plaintiff Pirtle originally sued Flanagan as one of the defendants, but took a nonsuit as to him. The trial court rendered judgment for Pirtle commanding the Gregorys and Coker to execute the oil and gas lease, but the court of appeals reversed that judgment, believing that the absence of Flanagan from the suit constituted fundamental error. 623 S.W.2d 955 (Tex. App.).

"Fundamental error" in civil actions arose in Texas under old statutes that stated that cases on appeal could be reviewed "on an error in law either assigned or apparent on the face of the record." 2 GAMMEL, LAWS OF TEXAS 1562 (1898); 3 GAMMEL, LAWS OF TEXAS 393 (1898). The practice of appellate courts in considering unassigned errors was the source of much mischief, and when the Texas Supreme Court promulgated its Rules of Civil Procedure in 1941, old article 1837 was repealed. Since that time, there has been no rule or statute that authorizes appellate consideration of errors for which there was no trial predicate that complained of the error. *McCauley v. Consolidated Underwriters*, 157 Tex. 475, 304 S.W.2d 265, 266 (1957); *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 984 (1947) (ALEXANDER, J., concurring). Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. STATE BAR OF TEXAS, APPELLATE PROCEDURE IN TEXAS § 11.5 (2d ed. 1979).

The reason for the requirement that a litigant preserve a trial predicate for complaint on appeal is that one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time.

Flanagan is said to be an indispensable party to this cause, because the defendants gave him an oil and gas lease and the validity of that lease has not been adjudicated. The defendants should not be heard to complain for the first time on appeal, however, because they did not complain at the trial level by exception, plea in abatement, motion to join other parties or otherwise.

We reaffirm the views we expressed in *Cooper v. Texas Gulf Industries, Inc*., 513 S.W.2d 200 (Tex. 1974). We there stated: Under the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined. *Id.* at 204.

In a case such as this, parties who participate in the trial without complaint will not be heard to complain at the appellate stage when "there is reason not to throw away a judgment just because it did not theoretically settle the whole controversy." *Continental Insurance Co. of New York v. Cotten*, 427 F.2d 48, 51 (9th Cir. 1970) (*citing Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1967).

Pursuant to Texas Rules of Civil Procedure, Rule 483, we grant the writ of error and, without hearing oral argument, reverse the judgment of the court of appeals and remand this cause to that court for disposition of the other points not reached.

Notes

1. In *Ramsey v. Dunlop*,[1] CHIEF JUSTICE ALEXANDER, in his concurring opinion stated: "[I]n so far as the rights of the litigants are concerned they are not entitled to have the court consider any error not assigned by them. It is my opinion that the Court of Civil Appeals is authorized to reverse a judgment of the trial court upon an unassigned error only when it involves a matter of public interest and when the record affirmatively and conclusively shows that the appellee was not entitled to recover, where the record affirmatively shows that the court rendering the judgment was without jurisdiction over the subject matter."

2. Examples of fundamental error, that do not relate to jurisdictional defects, are difficult to find. *Bradley v. State of Texas ex rel White*,[2] however, is a recent case that reflects non-jurisdictional fundamental error. Under TEX. R. EVID. 605 "[T]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve this point." In *Bradley*, city council members sitting as a court to remove the mayor of the city were held to be sitting as judges. The council members were, thus, bound by Rule 605, and violated the rule by testifying as witnesses in the removal proceeding. Under that section, a harm analysis is not necessary.

3. In *Waco Independent School District v. Gibson*, 22 S.W.3d 849 (Tex. 2000) the Court held that because subject matter jurisdiction is essential to the authority of a court to decide a case, it cannot be waived and may be raised for the first time on appeal. Thus, ripeness and standing, which are components of subject matter jurisdiction, cannot be waived.

4. *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014): "Our procedural rules are technical, but not trivial. We construe such rules liberally so that the right to appeal is not lost unnecessarily. *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd*., 249 S.W.3d 380, 388 (Tex. 2008). But when an objection fails to explain the nature of the error, we cannot make assumptions. Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error. *In re B.L.D*., 113 S.W.3d at 350 (citing *In re C.O.S*., 988 S.W.2d 760, 765 (Tex. 1999)). Affording courts this opportunity conserves judicial resources and promotes fairness by ensuring that a party does not neglect a complaint at trial and raise it for the first time on appeal. *Id*. (citing *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam)). Nor may we stray from these rules because Chad represented himself at trial. See *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex.1978)."

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[1] 146 Tex. 196, 205 S.W.2d 979 (1947).

[2] 990 S.W.2d 245 (Tex. 1999).

TEXAS ASSOCIATION OF BUSINESS
v.
TEXAS AIR CONTROL BOARD, et al
852 S.W.2d 440
(Tex. 1993)

R. Kinnan Golemon, James W. Checkley, Jr., Albert R. Axe, Jr., Scott R. Kidd and Douglas W. Alexander, Austin, for appellant.

Douglas G. Caroom, Mary E. Kelly, Dan Morales, Nancy N. Lynch, William D. Dugat, III and Amy R. Johnson, Austin, for appellees.

CORNYN, JUSTICE.

The Texas Association of Business (TAB), on behalf of its members, brought this declaratory judgment action seeking a ruling that statutes empowering two state administrative agencies to levy civil penalties for violations of their regulations conflict with the open courts and jury trial provisions of the Texas Constitution. The administrative agencies denied TAB's claims, and along with two Intervenors, filed counterclaims seeking a declaration that the same statutes and regulations comport with those constitutional provisions.

* * *

TAB alleges that it is a Texas not-for-profit corporation, that its members do business throughout Texas, and that it is authorized to represent its members on any matter that may have an impact on their businesses.

TAB filed this suit under the Uniform Declaratory Judgments Act, TEX.CIV.PRAC. & REM.CODE §§ 37.001-37.011, alleging that some of its members had been subjected to civil penalties assessed by either the Air Control Board or the Water Commission. TAB further alleged that all of its other members that operate their businesses pursuant to the pertinent provisions of the Texas Clean Air Act, the Texas Water Code, or the Texas Solid Waste Disposal Act or any rules or orders issued pursuant to those provisions were put at "substantial risk (if not certainty)" of being assessed civil penalties by the Air Control Board or the Water Commission. Thus this suit does not challenge specific instances of the Air Control Board's or the Water Commission's exercise, or threatened exercise, of the civil penalty power. Instead, TAB's suit is a facial challenge to the constitutionality of this administrative enforcement scheme under the Texas Constitution.

* * *

Before we reach the merits of this case, we first consider the matter of the trial court's jurisdiction, as well as our own; specifically we determine whether TAB has standing to challenge the statutes and regulations in question. Because TAB's standing to bring this action is not readily apparent, and because our jurisdiction as well as that of the trial court depends on this issue, we requested supplemental briefing on standing at the oral argument of this case. In response, the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal. We disagree.

Subject matter jurisdiction is essential to the authority of a court to decide a case. Standing is implicit in the concept of subject matter jurisdiction. The standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision. Subject matter jurisdiction is never presumed and cannot be waived.

One limit on courts' jurisdiction under both the state and federal constitutions is the separation of powers doctrine. *See* TEX.CONST. art. II, § 1; * * * Under this doctrine, governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution. Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department. *Firemen's Ins. Co. v. Burch,* 442 S.W.2d 331, 333 (Tex. 1969); *Morrow v. Corbin,* 122 Tex. 553, 62 S.W.2d 641, 644 (Tex.1933). Accordingly, we have interpreted the Uniform Declaratory Judgments Act, TEX.CIV.PRAC. & REM.CODE §§ 37.001-.011, to be merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions. *Firemen's Ins. Co.,* 442 S.W.2d at 333; *United Serv. Life Ins. Co. v. Delaney,* 396 S.W.2d 855, 863 (Tex. 1965); *California Prods., Inc. v. Puretex Lemon Juice, Inc.,* 160 Tex. 586, 334 S.W.2d 780 (1960).

The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Alabama State Fed'n of Labor v. McAdory,* 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945); *Firemen's Ins. Co.,* 442 S.W.2d at 333; *Puretex Lemon Juice, Inc.,* 160 Tex. at 591, 334 S.W.2d at 783. An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury. *See Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Texas courts, like federal courts, have no jurisdiction to render such opinions.

The separation of powers doctrine is not the only constitutional basis for standing. Under federal law, standing is also an aspect of the Article III limitation of the judicial power to "cases" and "controversies." *Sierra Club v. Morton,* 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972). To comport with Article III, a federal court may hear a case only when the litigant has been threatened with or has sustained an injury. *Valley Forge Christian College,* 454 U.S. at 471, 102 S.Ct. at 758. Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury. Specifically, the open courts provision provides:

> All courts shall be open, and every person for an **injury** done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13 (emphasis added). Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.

Under federal law, a lack of standing deprives a court of subject matter jurisdiction because standing is an element of such jurisdiction. * * * Other states have followed this analysis in construing their own constitutions. * * *

Subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties. *Texas Employment Comm'n v. International Union of Elec., Radio and Mach. Workers, Local Union No. 782,* 163 Tex. 135, 352 S.W.2d 252, 253 (1961); RESTATEMENT (SECOND) OF JUDGMENTS § 11, comment c (1982). This court recently reiterated that axiom in *Gorman v. Life Insurance Co.,* 811 S.W.2d 542, 547 (Tex.), *cert. denied,* 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991). Because we conclude that standing is a component of subject matter jurisdiction, it cannot be waived and may be raised for the first time on appeal.

If we were to conclude that standing is unreviewable on appeal at least three undesirable consequences could result. First and foremost, appellate courts would be impotent to prevent lower courts from exceeding their constitutional and statutory limits of authority. Second, appellate courts could not arrest collusive suits. Third, by operation of the doctrines of res judicata and collateral estoppel, judgments rendered in suits addressing only hypothetical injuries could bar relitigation of issues by a litigant who eventually suffers an actual injury. We therefore hold that standing, as a component of subject matter jurisdiction, cannot be waived in this or any other case and may be raised for the first time on appeal by the parties or by the court.

* * *

Because standing is a component of subject matter jurisdiction, we consider TAB's standing under the same standard by which we review subject matter jurisdiction generally. That standard requires the pleader to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Richardson v. First Nat'l Life Ins. Co.,* 419 S.W.2d 836, 839 (Tex. 1967). When reviewing a trial court order dismissing a cause for want of jurisdiction, Texas appellate courts "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *Huston v. Federal Deposit Ins. Corp.,* 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e. 1984); *see also* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals,* 21 ST. MARY'S L.J. 865, 870 (1990).

Here, however, we are not reviewing a trial court order of dismissal for want of jurisdiction, we are considering standing for the first time on appeal. A review of only the pleadings to determine subject matter jurisdiction is sufficient in the trial court because a litigant has a right to amend to attempt to cure pleading defects if jurisdictional facts are not alleged. *See* TEX.R.CIV.P. 80. Failing that, the suit is dismissed. When an appellate court questions jurisdiction on appeal for the first time, however, there is no opportunity to cure the defect. Therefore, when a Texas appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing.

TAB asserts standing on behalf of its members. The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Board of Water Engineers v. City of San Antonio,* 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955). Texas, however, has no particular test for determining the standing of an organization, such as TAB. * * * While we agree with the statement of the general test for standing set out in *Board of Water Engineers,* we foresee difficulties in relying on it alone to determine the standing of an organization like TAB. For instance, when members of an organization have individual standing, but the organization was not established for the purpose of protecting the particular interest at issue, it is not necessarily in the members' best interest to allow such a disinterested organization to sue on their behalf. Furthermore, an organization should not be allowed to sue on behalf of its members when the claim asserted requires the participation of the members individually rather than as an association, such as when the members seek to recover money damages and the amount of damages varies with each member.

The United States Supreme Court has articulated a standard for associational standing that lends itself to our use. We adopt that test today. In *Hunt v. Washington State Apple Advertising Commission,* the Court held that an association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *see also New York State Club Ass'n v. City of New York,* 487 U.S. 1, 9, 108 S.Ct. 2225, 2231, 101 L.Ed.2d 1 (1988); *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock,* 477 U.S. 274, 282, 106 S.Ct. 2523, 2528, 91 L.Ed.2d 228 (1986). This standard incorporates the standing analysis we adopted in *Board of Water Engineers,* yet addresses the additional concerns we have noted.

We now apply the *Hunt* standard to the case before us. Reviewing the record in its entirety for evidence supporting subject matter jurisdiction, and resolving any doubt in TAB's favor, we conclude that TAB has standing to pursue the relief it seeks in this case.

The first prong of the *Hunt* test requires that TAB's pleadings and the rest of the record demonstrate that TAB's members have standing to sue in their own behalf. This requirement should not be interpreted to impose unreasonable obstacles to associational representation. In this regard the United States Supreme Court stated that "the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n,* 487 U.S. at 9, 108 S.Ct. at 2232. We are satisfied that TAB has not manufactured this lawsuit. A comparison of the association's membership roster with the list of businesses subjected to state penalties indicates individual TAB members have been assessed administrative penalties pursuant to the challenged enactments. Additionally, TAB has alleged that other of its members remain at substantial risk of penalty. A substantial risk of injury is sufficient under *Hunt. See e.g., Pennell v. City of San Jose,* 485 U.S. 1, 7 n. 3, 108 S.Ct. 849, 855 n. 3, 99 L.Ed.2d 1 (1988) (concluding that association of landlords had standing based on pleadings that individual members would likely be harmed by rent ordinance). Thus TAB satisfies the first prong of the *Hunt* test.

The second prong of *Hunt* requires that TAB's pleadings and the rest of the record demonstrate that the interests TAB seeks to protect are germane to the organization's purpose. TAB was chartered to "represent the interests of its members on issues which may impact upon its members' businesses." Considering a very similar question in *New York State Club Association,* the United States Supreme Court held that: "[T]he associational interests that the consortium seeks to protect are germane to its purpose: appellant's certificate of incorporation states that its purpose is 'to promote the common business interests of its [member clubs].' " 487 U.S. at 10 n. 4, 108 S.Ct. at 2232, n. 4 (bracketed language in original). Likewise, the interests TAB desires to protect are germane to the organization's purpose, and thus the second prong is met.

Under the third and final prong of the *Hunt* test, TAB's pleadings and the record must demonstrate that neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. The Supreme Court has interpreted this prong as follows:

> [W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed

> that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Hunt, 432 U.S. at 343, 97 S.Ct. at 2441 (quoting *Warth,* 422 U.S. at 515, 95 S.Ct. at 2213).

By seeking damages on behalf of its members, necessitating that each individual prove lost profits particular to its operations, the organization in *Warth* lacked standing to sue; rather, each individual member had to be a party to the suit. These facts are distinguishable from *Brock,* in which the union challenged an administrative interpretation of statutory provisions relating to unemployment compensation. 477 U.S. 274, 106 S.Ct. 2523. Recognizing that the suit raised "a pure question of law," and that "the individual circumstances" of any aggrieved member were not in issue, the Court held that the UAW had standing to challenge the government's actions. *Id.* at 287-88, 290, 106 S.Ct. at 2531-32, 2533; *see also Pennell,* 485 U.S. at 7 n. 3, 108 S.Ct. at 855 n. 3 (facial challenge to rent ordinance does not require participation of individual landlords). Here, TAB seeks only prospective relief, raises only issues of law, and need not prove the individual circumstances of its members to obtain that relief, thus meeting the third prong of *Hunt.*

Having found that TAB meets all three prongs of the *Hunt* test, we conclude that TAB has standing to pursue the relief it seeks in this case.

* * *

Concurring and dissenting opinions by DOGGETT, GAMMAGE and SPECTOR, JJ(omitted). HIGHTOWER, J., not sitting.

Note

Meyers v. JDC/Firethorne, Ltd., 548 S.W.3d 477 (Tex. 2018): Under Texas law, the standing inquiry begins with determining whether the plaintiff has *personally* been injured, that is, "he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury." The second element requires that the plaintiff's alleged injury be "fairly traceable" to the defendant's conduct because "a court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." This required showing of a causal connection between the plaintiff's injury and the defendant's conduct serves as a means of identifying the proper defendants. *See* To establish the third standing requirement—often referred to as "redressability"—a plaintiff must show that there is a substantial likelihood that the requested relief will remedy the alleged injury. ("The redressability prong deprives courts of jurisdiction over cases in which the likelihood of the requested relief redressing the plaintiff's injury is only speculative."). "If, for example, a plaintiff suing in a Texas court requests injunctive relief . . . but the injunction could not possibly remedy his situation, then he lacks standing to bring that claim."

ALLSTATE INDEMNITY COMPANY
v.
FORTH

204 S.W.3d 795
(Tex. 2006)

Roger Higgins, Thompson Coe Cousins and Irons, L.L.P., Dallas, Jeffrey P. Lennard, Sonnenschein Nath & Rosenthal LLP, Chicago, IL, for Petitioner.

G. Laird Morgan, Stephen Gardner, Law Office of Stephen Gardner, PC, John M. Phalen Jr., Daniel Sheehan & Associates, L.L.P., Dallas, for Respondent.

PER CURIAM.

In this breach of contract suit, we consider whether an insured has standing to sue her insurance company for settling her medical bills in what the insured considered to be an arbitrary and unreasonable manner. In reversing the trial court and remanding the case for trial, the court of appeals concluded that the insured had standing even though the insured had no out-of-pocket expenses, and her health care providers had not, and now could

not, collect any additional sum from her. 151 S.W.3d 732, 738. Because there are no allegations that the insured suffered damages or that the manner in which the insurance company settled the insured's medical expenses caused her any injury, we conclude that the trial court was correct to dismiss her suit, and accordingly we reverse the court of appeals' judgment.

Pat Forth's daughter required medical treatment in 1997 as the result of an auto accident. The personal-injury-protection (PIP) of Forth's Allstate auto insurance policy, covered "reasonable medical expenses incurred for necessary medical services." Allstate settled Forth's medical bills for less than the actual amount billed. Forth sued Allstate for injunctive and declaratory relief, alleging that it arbitrarily reduced her bills without using an independent and fair evaluation to determine what amount of her medical expenses were reasonable. According to Forth, Allstate routinely discounts medical expenses by comparing those charges to a third-party contractor's computerized database. Allstate then offers about eighty-five percent of the medical expenses reflected in that database for the same treatment or procedure. Forth did not claim that Allstate's conduct had caused her any damage.

In the trial court, Allstate filed a motion to dismiss, arguing that Forth lacked standing because she had no claim for damages, and Allstate had not caused her any actual injury. The trial court granted Allstate's motion, and the court of appeals affirmed in part and reversed in part, holding that Forth lacked standing to seek prospective relief because Allstate no longer insured her, but that she could seek retrospective relief for any injury suffered while she was a policy holder. The court concluded that if a fair and independent evaluation of the medical bills revealed that Allstate paid less than the full amount of Forth's "reasonable expenses," then Forth could claim injury because the terms of the insurance contract required that reasonable expenses be paid.

The court of appeals relied on *Black v. American Bankers Insurance Co*., 478 S.W.2d 434 (Tex. 1972) and *American Indemnity Co. v. Olesijuk*, 353 S.W.2d 71, 72 (Tex. Civ. App.—San Antonio 1961, writ dism'd w.o.j.) to support its view that the insured had standing to sue her insurance company despite its settlement of her medical claims to the apparent satisfaction of the medical providers. Both *Black* and *Olesijuk* held that the insurance companies' obligation to pay under the respective policies was triggered by the insured's incurrence of medical expenses and was not affected by the fact that the insured had not, in fact, had to pay those expenses. In both cases, a third party paid the medical expenses, but the respective courts concluded that such fact did not alter the obligation of the insurance company to pay under its policy. Unlike the insurance companies in Olesijuk and Black, Allstate did not question whether Forth had incurred medical expenses and did not refuse to pay the medical providers. Instead, Allstate paid the medical bills according to its own evaluation.

Under Texas law, to have standing a party must have suffered a threatened or actual injury. Forth does not claim that she has any unreimbursed, out-of-pocket medical expenses. She does not assert that these providers withheld medical treatment as a result of Allstate reducing their bills, or threatened to sue her for any deficiency, or harassed her in any other manner. Moreover, Forth has no exposure in the future because limitations has now run on the medical claims. From all appearances, her medical providers have accepted the amount Allstate paid them without complaint, thereby satisfying Allstate's obligation under the policy.

Because Forth does not claim that the manner in which Allstate settled her claim caused her any injury, we conclude that she does not have standing in this case. Accordingly, we reverse the court of appeals' judgment and, without hearing oral argument, render judgment dismissing Forth's claims against Allstate.

Note

In *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc*., 192 S.W.3d 780 (Tex. 2006), the Court held that there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners for pure economic loss, because such claims are necessarily limited to recovery for property damage. In that case the joint, independent executors of an estate sued several attorneys and their law firm, for legal malpractice. The Court noted that even though an estate may suffer significant damages after a client's death, this does not preclude survival of an estate-planning malpractice claim.